

# ANATOMY OF A WRONGFUL CONVICTION: *STATE v. DEDGE* AND WHAT IT TELLS US ABOUT OUR FLAWED CRIMINAL JUSTICE SYSTEM

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*“A moment of rare enlightenment is at hand. For generations, American lawyers and crusaders have fought to overturn the convictions of people they believed innocent. Until recently, they had to rely on witnesses to recant or for the real perpetrators to confess. In what seems like a flash, DNA tests performed during the last decade of the century not only have freed seventy-four individuals but have exposed a system of law that has been far too complacent about its fairness and accuracy. What matters most is not how these people got out of jail but how they got into it.”*

Barry Scheck, Peter Neufeld, and Jim Dwyer, *Actual Innocence*<sup>1</sup>

*“[T]he law holds, that it is better that ten guilty persons escape, than that one innocent suffer.”*

Lord William Blackstone<sup>2</sup>

## I. INTRODUCTION

It is one of the greatest injustices of all: the wrongful conviction and imprisonment of an innocent person. Although a few notorious examples have garnered publicity, it is an injustice that has been repeated thousands of times over the past few decades in the United States.<sup>3</sup> Because the majority of these cases involve serious crimes, moreover, the consequences have been dire: even in non-capital cases, those wrongfully convicted typically lose years of their lives behind bars while struggling to prove their innocence. A 2005 non-exhaustive study of exonerations in the United States from 1989 through 2003 “found 340 exonerations, 327 men and

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<sup>1</sup> BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* xix-xx (2001).

<sup>2</sup> LORD WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, BOOK IV, CH. 27, 359 (1765).

<sup>3</sup> See, e.g., Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 809 (2007) (“One survey of Ohio criminal justice officials estimates that wrongful convictions occur in about 1 of every 200 felony criminal cases (.5%). This translates to more than 5000 innocent persons being convicted of serious crimes in 2002.”).

13 women; 144 of them were cleared by DNA evidence, [and] 196 by other means.”<sup>4</sup> The authors found that in most cases,

[the ultimately exonerated individuals] had been in prison for years. More than half had served terms of ten years or more; 80% had been imprisoned for at least five years. As a group, they had spent more than 3400 years in prison for crimes for which they should never have been convicted—an average of more than ten years each.<sup>5</sup>

In four of the cases, the state acknowledged the innocence of the wrongfully convicted posthumously, for the men had died in prison.<sup>6</sup>

At least two recent members of the United States Supreme Court have decried the alarming frequency of wrongful convictions, particularly in capital cases. In a recent speech, Justice John Paul Stevens expressed his concerns, stating, “[t]he recent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent.”<sup>7</sup> Justice Sandra Day O’Connor similarly observed, “we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. These exonerations have included at least one mentally retarded person who unwittingly confessed to a crime that he did not commit.”<sup>8</sup>

A recent report by Professor James Liebman of Columbia Law School, et al., reveals the extent of the problem:

68% of all death verdicts imposed and fully reviewed during the 1973-1995 study period were reversed by courts due to serious errors. Analyses presented for the first time here reveal that 76% of the reversals at the two appeal stages where data are available for study were because defense lawyers had been egregiously incompetent, police and prosecutors had suppressed exculpatory evidence or committed other professional misconduct, jurors had been misinformed about the law, or judges and jurors had been biased. . . . 82% of the cases sent back for retrial at the second appeal phase ended in sentences less than death, including 9% that ended in not guilty verdicts.<sup>9</sup>

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<sup>4</sup> Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005) [hereinafter Gross et al.].

<sup>5</sup> *Id.* See Facts on Post-Conviction DNA Exonerations, The Innocence Project, available at <http://www.innocenceproject.org/Content/351.php> (examining 242 post-conviction DNA exonerations in the United States, the Innocence Project reports that the average length of time served by exonerees is twelve years.).

<sup>6</sup> Gross et al., *supra* note 4, at 524.

<sup>7</sup> *Justice Stevens Criticizes Election of Judges*, WASH. POST, Aug. 4, 1996, at A14.

<sup>8</sup> *Atkins v. Virginia*, 536 U.S. 304, 320 n.25 (2002).

<sup>9</sup> JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES AND WHAT CAN BE DONE ABOUT IT i (Feb. 11, 2002), <http://www.law.columbia.edu/brokensystem2/report.pdf>.

In other words, more than eight in ten cases retried because of serious error were found not to merit the death penalty, and nearly one of every ten defendants sentenced to die was found not guilty of the crime of which he or she was convicted.<sup>10</sup>

Several factors contribute to wrongful convictions, including ineffective assistance of counsel, police and prosecutorial misconduct, false confessions, mistaken identification, the use of unreliable jailhouse informants, or “snitches,” and the admission of faulty “scientific” evidence.<sup>11</sup>

Often, as in the case to which we will soon turn, several of these factors combine to produce an erroneous conviction. Of all of these factors, however, eyewitness misidentification has proven to be the most troublesome. Four decades ago, Justice Brennan warned of the dangers of mistaken identification:

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: “What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.”<sup>12</sup>

Numerous subsequent studies have confirmed Justice Brennan’s wisdom. According to the Center on Wrongful Convictions at Northwestern Law School, “[e]rroneous eyewitness testimony—whether offered in good faith or perjured—no doubt is the single greatest cause of wrongful convictions in the U.S. criminal justice system.”<sup>13</sup> Indeed, data gathered by Cardozo Law School’s Innocence Project shows that erroneous eyewitness identifications “contributed to over 75% of the 177 wrongful convictions” that were overturned by the use of DNA evidence through 2006.<sup>14</sup> Meanwhile, a 2004 study by Yale University and U.S. Navy researchers, led by Yale behavioral scientist Charles A. Morgan, found that even healthy victims who get a good look at their perpetrators are unlikely to identify them accurately later.<sup>15</sup> The researchers evaluated elite Navy and Marine officers participating in Prisoner of War survival training, which includes sleep and food deprivation. They found that only thirty percent of officers in a high-stress group made accurate identifications of officers who had posed as “enemy” interrogators.<sup>16</sup> Notably,

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<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., The Causes of Wrongful Convictions, The Innocence Project, available at <http://www.innocenceproject.org/understand/>.

<sup>12</sup> *United States v. Wade*, 388 U.S. 218, 228 (1967).

<sup>13</sup> ROB WARDEN, HOW MISTAKEN AND PERJURED EYEWITNESS TESTIMONY PUT 46 INNOCENT AMERICANS ON DEATH ROW: AN ANALYSIS OF WRONGFUL CONVICTIONS SINCE RESTORATION OF THE DEATH PENALTY FOLLOWING *FURMAN V. GEORGIA* 1 (2001), <http://www.deathpenaltyinfo.org/StudyCWC2001.pdf>. See *Kampshoff v. Smith*, 698 F.2d 581, 585 (2d Cir. 1982) (“There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial.”).

<sup>14</sup> INNOCENCE PROJECT, BENJAMIN N. CARDOZO SCHOOL OF LAW, EYEWITNESS MISIDENTIFICATION IN FLORIDA AND NATIONWIDE (2009), <http://www.innocenceproject.org/docs/FloridaMistakenID.pdf>.

<sup>15</sup> Charles A. Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT’L J.L. & PSYCHIATRY 265 (2004).

<sup>16</sup> *Id.* at 272.

officers who were more confident about their identification were not more likely to be accurate.<sup>17</sup> The study concluded that “[c]ontrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than [thirty minutes], a large number of subjects in this study were unable to correctly identify their perpetrator.”<sup>18</sup>

Thankfully, due largely to DNA testing and improved science, there is an increasing awareness of wrongful convictions in the United States, which parallels the increasing number of exonerations. The rate of exonerations increased sharply between 1989 and 2003, “from an average of twelve a year from 1989 through 1994, to an average of forty-two a year since 2000. The highest yearly total was forty-four, in 2002 and again in 2003.”<sup>19</sup> Yet, these exonerations have not come easily. In case after case, the wrongfully convicted have been forced to fight excruciating battles in an attempt to establish their innocence. They must struggle against a legal system that has erected significant hurdles in the path of post-conviction appeals, and against prosecutors who, time and time again, claim that “finality” and a sense of closure for victims and their families are more important than conclusively determining the truth.<sup>20</sup> The case of *State v. Dedge* illustrates the tyranny of this system.

## II. STATE v. DEDGE

On the afternoon of December 8, 1981, Wilton Dedge was working as a mechanic in a garage in New Smyrna Beach, Florida, a small community located approximately fifteen miles

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<sup>17</sup> *Id.* at 274.

<sup>18</sup> *Id.*

<sup>19</sup> Gross et al., *supra* note 4, at 527.

<sup>20</sup> See Sally Watt, *Unlocking the Evidence*, ORLANDO WEEKLY, June 28, 2000, <http://www.orlandoweekly.com/util/printready.asp?id=1823>; Leonora LaPeter, *Guilty Until Proven Innocent*, ST. PETERSBURG TIMES, Nov. 14, 2004, available at [http://www.sptimes.com/2004/11/14/State/Guilty\\_until\\_proven\\_i.shtml](http://www.sptimes.com/2004/11/14/State/Guilty_until_proven_i.shtml) (quoting Florida chief assistant state attorney, Robert Holmes, who emphasized the need for finality); see, e.g., Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1265-66 (2005) (“[C]riminal justice officials have argued that allowing belated actual innocence challenges grossly undermines the government’s well-established interests in finality of judgments and providing victim closure. . . . Applying the interest in finality of judgments to post-conviction DNA testing, criminal justice officials argue that finality must trump the very human desire of the convicted to perpetually seek their freedom through every available avenue, including subjecting old evidence to DNA testing and other technologies that might become available.”). It is not only prosecutors who adhere to this philosophy of “finality.” For example, in 1998, Chief Justice Sharon Keller of the Texas Court of Criminal Appeals wrote an opinion denying a new trial to Roy Criner, who was convicted of rape and murder, even though DNA testing revealed that the semen found in the victim was not his. *Guilt and Innocence: If a coroner rejects a finding of homicide, should a conviction stand?*, HOUSTON CHRONICLE, Sept. 16, 2009 (“‘We can’t give new trials to everyone who establishes after conviction that they might be innocent,’ Keller told a PBS interviewer. According to the judge, such a situation would mean there would be no finality in a criminal justice system. ‘And finality,’ she said, ‘is important.’”). See also *In re Troy Anthony Davis*, No. 08-1443, 2009 U.S. LEXIS 5037, at \*7 (2009) (Scalia, J., dissenting) (“This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged ‘actual innocence’ is constitutionally cognizable.”) (emphasis in original).

south of Daytona Beach.<sup>21</sup> A high school drop-out and twenty years old at the time, Mr. Dedge lived with his parents in nearby Port St. John, Florida, scraping by with odd jobs that included, as on this fateful day, installing and rebuilding transmissions. “I was still a kid,” Mr. Dedge explained, “surfing, skateboarding, having a good time, and just living for the moment. I really didn’t have any plans yet on how I was going to live my life.”<sup>22</sup>

That same afternoon at four o’clock, Jane Smith, a seventeen-year-old cosmetology student, returned to her family home in Canaveral Groves, Florida, about forty-seven miles south of New Smyrna Beach, after a job search. Her father, stepmother, and sister were not home. Changing clothes inside her room, she heard a noise and turned to face a large, tall, and powerful man wielding a razor knife.<sup>23</sup> The assailant cut off her clothes and brutally raped her two times. In addition, using the razor knife, he slowly and deliberately cut her sixty-five times on her face and body over a forty-five minute period.<sup>24</sup> After the assailant punched Ms. Smith in the face, he left with the contents of her purse.<sup>25</sup>

Ms. Smith then called her boyfriend, who took her to the hospital for treatment and for the preparation of a rape kit.<sup>26</sup> She provided the police with a description of her assailant: he was between six feet and six feet two inches tall, weighing between 160 and 200 pounds,<sup>27</sup> with hazel eyes, a receding hairline, and long, blond hair. Meanwhile, police carefully searched Ms. Smith’s bedroom for clues, taking her sheets and other materials to the laboratory for analysis. The police found two pubic hairs, but nothing else of value at the scene.

Days after the crime, Ms. Smith and her sister drove to a nearby town, stopping at a convenience store for refreshments. There, Ms. Smith saw a man who, she told her sister, looked like her attacker. Ms. Smith’s sister recognized the man from elementary school; she believed his name was “Walter Hedge.”<sup>28</sup> Ms. Smith refused to summon the police. About a week later, however, she returned to the convenience store and saw the same man. This time, she called the police and eventually met with a detective on January 6, 1982, nearly a month after the crime occurred. On January 8, 1982, Brevard County police arrested Walter Dedge, Wilton’s older brother, based on the statements by Ms. Smith’s sister.<sup>29</sup> Walter Dedge was later released from

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<sup>21</sup> The background facts provided in the ensuing pages were gleaned from an interview with Wilton Dedge himself and with his mother and father, extensive interviews with various members of Mr. Dedge’s legal team, and a review of all of the papers and proceedings in the case of *State v. Dedge*, unless otherwise attributed.

<sup>22</sup> Telephone Interview with Wilton Dedge (Dec. 30, 2006) [hereinafter Dedge Interview].

<sup>23</sup> Trial Transcript at 403-04, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. Aug. 22, 1984) [hereinafter 1984 Transcript] (prosecutor referring to the instrument in question as a “razor knife”) (copy on file with author). The victim later clarified, “It was a razor blade, it wasn’t a knife, and it had a little switch on it . . . .” *Id.* at 446.

<sup>24</sup> Watt, *supra* note 20.

<sup>25</sup> See 1984 Transcript, *supra* note 23, at 404; LaPeter, *supra* note 20.

<sup>26</sup> 1984 Transcript, *supra* note 23, at 405; Memorandum of Law in Support of Post-conviction Motion for an Order Releasing Trial Evidence for DNA Testing at 1, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. Apr. 24, 1997) [hereinafter 1997 Memo] (copy on file with author).

<sup>27</sup> *Dedge v. State*, 442 So. 2d 429, 430 (Fla. Ct. App. 1983).

<sup>28</sup> Innocence Project, *Know the Cases: Wilton Dedge*, <http://www.innocenceproject.org/Content/84.php> (last visited Mar. 6, 2010) [hereinafter Innocence Project]; 1997 Memo, *supra* note 26.

<sup>29</sup> Innocence Project, *supra* note 28; 1997 Memo, *supra* note 26, at 2.

custody after Ms. Smith identified Wilton Dedge in a photo lineup.<sup>30</sup> At the time, Wilton Dedge had long, blond hair, but he stood five feet five inches tall and weighed a scrawny 125 pounds,<sup>31</sup> upwards of seventy-five pounds lighter and nine inches shorter than the assailant Ms. Smith described to the police.

Dedge was dumbfounded, repeatedly proclaiming his innocence. He had no criminal record, much less a record of such brutality. In addition, several witnesses could place him at the garage at the time of the crime, and indeed the entire day. Ms. Smith erroneously identified Walter; now she misidentified Wilton. This would all be cleared up in short order. Wilton Dedge remembers not being worried, explaining: “I knew I was innocent, so I knew it would get cleared up. My parents are law-abiding people. I was raised to believe in the legal system. I knew it would get straightened out.”<sup>32</sup>

#### A. The Evidence and the Trial

DNA analysis was not yet available to confirm the source of the pubic hairs found at the crime scene, but a forensic expert analyzed the hairs and compared them to samples from the victim and from Dedge. One of the hairs belonged to Ms. Smith. Comparing the other hair to the sample from Dedge, the expert observed both similarities and differences. “However,” the expert noted, “the differences were not sufficient to entirely eliminate Dedge as a possible source.”<sup>33</sup>

The only other “evidence” that the police were able to develop before trial involved the use of a scent dog months after the crime. In March 1982, Dedge wet his hands in the Brevard County Courthouse bathroom, dried them on paper towels from a bathroom dispenser, and handed the paper towels to an investigator. The investigator grasped the paper towels by the edges, hung them to dry, and then placed them in a paper bag from a coffee shop in the building.<sup>34</sup> Eight days later, police dog handler John Preston and his German shepherd, Harrass II, conducted a “scent lineup” using the sheets from Ms. Smith’s bedroom and four dirty sheets from the local jail that Dedge had never touched. Harrass II sniffed the dried, eight-day-old paper towels in the bag and Preston walked the canine up and down the lineup of sheets, commanding him to “search.” On the second pass, Harrass II stopped at the (bloody) sheet from Ms. Smith’s bed, allegedly detecting Mr. Dedge’s scent on the sheet—more than three months after the crime. Harrass II was later

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<sup>30</sup> See LaPeter, *supra* note 20.

<sup>31</sup> Dedge, 442 So. 2d at 430; Innocence Project, *supra* note 28.

<sup>32</sup> Watt, *supra* note 20.

<sup>33</sup> LaPeter, *supra* note 20. Microscopy comparison, or comparing hairs under a microscope, has been used in criminal trials since 1879, and it has been widely criticized. Modern studies and the advent of DNA testing raise questions of the reliability of microscopy for determining guilt in a court of law. See Clive A. Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?*, COLUM. HUM. RTS. L. REV. 227, 233 (1996) (finding that hair comparisons have been accepted in criminal prosecutions without being subjected to validation required of any legitimate science). For example, in a blind test of 240 crime labs throughout the country, the rate of unacceptable matches—from failing to recognize a hair match to making an erroneous one—ranged from 27.6 to 67.8 percent. Diana Baldwin & Ed Godfrey, *Hair Analysis Under Scrutiny*, DAILY OKLAHOMAN, June 3, 2001 (discussing a 1970s proficiency testing program sponsored by the Law Enforcement Assistance Administration (LEAA), formerly a part of the U.S. Justice Department) (citing BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE 209-10 (2001)).

<sup>34</sup> See LaPeter, *supra* note 20.

brought to Ms. Smith's home, where he supposedly indicated Dedge's presence more than three months earlier by touching his nose to various areas in the house.<sup>35</sup>

The trial began in September 1982 and lasted eight days. The State relied upon three things to prove Dedge's guilt: 1) the eyewitness testimony of Ms. Smith; 2) the hair analysis; and 3) the dog scent lineup.

First, Ms. Smith's testimony was alarmingly contradictory. Dedge is between seven and nine inches shorter than the assailant she had described to the police. Ms. Smith had described a large and muscular assailant with hazel eyes<sup>36</sup> and a "receding hairline."<sup>37</sup> She described him as a man with "big arms" who "looked like a construction worker," and who easily threw her around and pinned her down.<sup>38</sup> Dedge is a small, slight man—just one inch taller than the victim.<sup>39</sup> He has blue eyes, not hazel, and to this day he sports a full head of hair.<sup>40</sup>

Second, the hair analysis certainly did not confirm Dedge's presence at the scene of the crime. Not only was there no identical match, but there were several differences; the State's own expert concluded merely that "the differences were not sufficient to entirely eliminate Dedge as a possible source."<sup>41</sup> As Dedge later explained, "that's what their expert said, but during the course of the trial the D.A. reinforced it until at the end he was telling the jury that we have a perfect match."<sup>42</sup>

Finally, the dog scent evidence was profoundly flawed. As a November 2000 article in *Science* magazine explains, canine scent evidence is routinely submitted in criminal trials despite the fact that there is "little or no underlying body of scientific evidence affirming the validity of its use."<sup>43</sup> These tests are questionable at best, and here, the test was conducted more than three months after the crime, using eight-day-old, dried paper towels touched by others aside from Dedge and stored in a paper bag. The defense prepared to present expert testimony that would explain the flaws inherent in scent identification evidence and the impossibility of tracking scent under the circumstances, but the trial judge refused to admit the testimony.<sup>44</sup> In fact, the judge rejected the testimony without even viewing the evidence the defense proffered.<sup>45</sup>

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<sup>35</sup> *Dedge*, 442 So. 2d at 430.

<sup>36</sup> Petition for Expungement of Record, Factual Findings and Other Relief Including Actions for Declaratory Relief and Damages and Equitable Relief Under Extraordinary Writ Authority at 4, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. 2005) (document undated) [hereinafter 2005 Petition] (copy on file with author).

<sup>37</sup> See 1984 Transcript, *supra* note 23, at 511. The victim also told the police that although she later discovered that the attacker had hair, at one point, "I got the appearance that he was bald." *Id.* at 512. Upon retrial in 1984, she described the attacker's hairline as "far receding." *Id.* at 456, 511.

<sup>38</sup> 1997 Memo, *supra* note 26, at 10.

<sup>39</sup> See *supra* note 31 and accompanying text.

<sup>40</sup> Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, N.Y. TIMES, Aug. 29, 2003 ("He still sports a full head of hair."); Dedge Interview, *supra* note 22.

<sup>41</sup> See *supra* note 33 and accompanying text.

<sup>42</sup> *Larry King Live* (CNN television broadcast Dec. 21, 2005).

<sup>43</sup> I. Lehr Brisbin, Jr., Steven Austad & Steven K. Jacobson, *Canine Detectives: The Nose Knows – Or Does It? Unreliability of Scent Evidence*, SCIENCE, Nov. 10, 2000, at 1093.

<sup>44</sup> *Dedge*, 442 So. 2d at 430-31.

<sup>45</sup> See *infra* note 49 and accompanying text.

Mr. Dedge took the stand and proclaimed his innocence. In addition, six witnesses confirmed his alibi: he was at the auto shop nearly fifty miles away at the time of the crime.<sup>46</sup> Four of the witnesses testified that they were certain Dedge worked at the shop until closing, between 5:00 and 5:30 p.m. In fact, the shop owner testified that he closed the shop with Dedge and the two of them rode their motorcycles to a nearby pub, eating and drinking together before heading to another bar.<sup>47</sup> Mr. Dedge could not have committed the crime. “The shop was pretty small,” said Dedge, “about the size of a house lot. It wasn’t like I could disappear from the job without anyone noticing.”<sup>48</sup>

The jury deliberated for four hours before pronouncing Dedge guilty of the rape and robbery.<sup>49</sup> The judge sentenced him to thirty years in prison. Gary Dedge, Wilton’s father, recalled his reaction to the jury’s decision: “We felt like the world had just dropped out from under us.”<sup>50</sup> He continued, “[w]e couldn’t understand how the jury could believe the ridiculous evidence against Wilton. I’ve trailed deer, and even a good deer dog can’t follow a deer trail beyond twenty-four hours. How in the world could a dog follow a human trail, through clothing and shoes, three months later?”<sup>51</sup>

“I knew the guy was a scam artist,” said Gary Dedge, “but most of the people on the jury had never gone hunting, and they believed anything the prosecutor told them, taking it as gospel.”<sup>52</sup>

### B. A Second Chance

As Dedge served his prison sentence, his parents scraped together the money to mount an appeal. The trial court’s exclusion of expert scent identification testimony provided a strong basis. On appeal, Florida’s Fifth District Court of Appeal concluded that expert qualifications are “to be decided by the trial court determined by the testimony adduced,” and the trial court’s failure to view the defense’s proffered videotape before determining that the defense witness did not qualify as an expert in human scent discrimination was reversible error.<sup>53</sup> As a result, Dedge was given a second chance.

At the second trial, in August 1984, newly-retained defense counsel, Mark Horwitz, stood prepared to impeach the State’s evidence. Upon investigating Preston, the dog handler, Mr. Horwitz discovered that “[t]he guy would say just about anything.”<sup>54</sup> Transcripts of Preston’s testimony in previous cases contained glaring inconsistencies and outrageous, unsupported claims.<sup>55</sup> According to Horwitz, transcripts revealed that Preston would “say one thing on one day and the very opposite on another.”<sup>56</sup> For example, Preston testified that he was a member of

<sup>46</sup> Dedge Interview, *supra* note 22.

<sup>47</sup> LaPeter, *supra* note 20.

<sup>48</sup> Dedge Interview, *supra* note 22.

<sup>49</sup> LaPeter, *supra* note 20.

<sup>50</sup> Telephone Interview with Gary Dedge (Nov. 5, 2006) [hereinafter G. Dedge Interview].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Telephone Interview with Mark Horwitz (Oct. 9, 2006) [hereinafter Horwitz Interview].

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

the United States Police Canine Association, but he was not.<sup>57</sup> Preston testified that he was a member of the United States Canine Association; he was not.<sup>58</sup> Additionally, “[t]he amount of training the dog had allegedly received changed in different cases,” says Horwitz.<sup>59</sup> Preston testified that his dog had received 540 hours of training at the Tom McGean School for Dogs, but later testified that the dog received merely 250 hours of training at the school.<sup>60</sup>

In fact, it appeared no one, including the Brevard County prosecutors who frequently utilized Preston’s services, had ever tracked his testimony for consistency or critically analyzed Preston’s assertions. Among his more outlandish claims, Preston asserted that Harass II could track a six-year-old scent.<sup>61</sup> Preston also testified in a robbery trial that he was able to track the scent of the robber over an asphalt parking lot, two or three weeks after the crime, and that Harass II could determine how the robber entered and exited the scene, solely based upon scent.<sup>62</sup>

On cross-examination, Horwitz pointed out problems in the investigation and handling of evidence in the Dedge case. Namely, various investigators had handled the paper bag containing Dedge’s paper towels, and the paper bag was kept in an evidence locker right next to the sheets, quite possibly contaminating the evidence. When Preston argued that the scent could not have passed through the paper bag, Horwitz introduced testimony in the aforementioned robbery in which Preston contended that the robber’s scent passed through his leather shoes and onto the asphalt.<sup>63</sup> Since leather soles are thicker than a paper bags, Preston was forced to admit inconsistencies during cross-examination. Credibility issues of this sort rendered the prosecution’s weak case against Dedge even weaker.

Then came Clarence Zacke. A seven-time convicted felon,<sup>64</sup> Zacke was a notorious snitch. As the *St. Petersburg Times* explains:

[A] one-time millionaire with an auto salvage business, Zacke had been sentenced to 180 years for three murder-for-hire plots. He tried to hire two hit men to kill a witness in a drug-smuggling case against him. He tried to get someone else to murder one of the hit men. In jail, Zacke tried to hire another inmate to kill the state attorney who prosecuted him, to “get even.”<sup>65</sup>

Prosecutors shaved 120 years off of Zacke’s sentence for turning State’s evidence on other defendants in the case.<sup>66</sup> Unfortunately for Dedge, on his way to a bail hearing in January 1984, he shared a prison van with Zacke, striking up a conversation despite his attorney’s strict instruction “not to talk to anyone.”<sup>67</sup> That night, Zacke’s son called the prosecutor to offer Zacke’s testimony against Dedge. Specifically, Zacke claimed that Dedge—who had never met

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<sup>57</sup> 1984 Transcript, *supra* note 23, at 864.

<sup>58</sup> *Id.* at 865.

<sup>59</sup> Horwitz Interview, *supra* note 54.

<sup>60</sup> 1984 Transcript, *supra* note 23, at 851-53.

<sup>61</sup> Horwitz Interview, *supra* note 54.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 1984 Transcript, *supra* note 23, at 1203.

<sup>65</sup> LaPeter, *supra* note 20.

<sup>66</sup> *See, e.g.,* Liptak, *supra* note 40 (“A truck confiscated by the State was also released to [Zacke’s] wife as part of the same deal.”).

<sup>67</sup> Horwitz Interview, *supra* note 54.

Zacke before—confessed to committing the crime, stating, “I just raped and cut some old hog.”<sup>68</sup> Ms. Smith was seventeen at the time of the attack.<sup>69</sup>

This was not the first time that Zacke had mysteriously provided key testimony for the Brevard County prosecutors in the retrial of a high-profile and questionable case. In 1981, Gerald Stano was tried for the brutal murder of seventeen-year-old Cathy Lee Scharf.<sup>70</sup> Stano, whom many believed was mentally ill,<sup>71</sup> confessed to the crime, along with dozens of other murders in several states. Some of these confessions were dismissed as patently false, while other confessions led to plea bargains.<sup>72</sup> There was not a shred of evidence linking Stano to any of the crimes, including the Scharf murder: no physical evidence, eyewitness testimony, or forensic evidence of any kind.<sup>73</sup> Given this lack of evidence, and because the details of Stano’s confession did not match the Scharf crime, the jury failed to reach a verdict.<sup>74</sup>

During the second trial of Mr. Stano in 1983, the Brevard County state attorneys unleashed their secret weapon: Clarence Zacke. Zacke testified that Stano confessed to the murder when Stano was conveniently alone with Zacke.<sup>75</sup> During his testimony, Zacke provided details that, unlike Stano’s confession, matched the crime. This time, the jury convicted Stano and sentenced him to death.<sup>76</sup> Over a decade later, in 1998, with Stano’s appeals exhausted, there was a break in the case: in an interview with journalist Nash Rosenblatt, Zacke retracted his testimony. As Mr. Rosenblatt’s sworn affidavit to the court describes:

Zacke told me that what he testified to at Stano's trial was not true. Zacke said that Zacke's attorney came to him after the mistrial in Mr. Stano's case and said that the state wanted Zacke to testify for them because they were having trouble obtaining a conviction of Mr. Stano. Zacke agreed to do so, in return for favors from the state. After that, according to Zacke, two persons from the prosecutor's office told him what to say at trial.<sup>77</sup>

In March 1998, the Florida Supreme Court denied Stano a retrial based on Zacke’s retraction. The Court ruled that, even if Rosenblatt’s affidavit were admissible evidence, “there was no reasonable probability that the outcome of a new trial would produce an acquittal.”<sup>78</sup>

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<sup>68</sup> 1984 Transcript, *supra* note 23, at 1210.

<sup>69</sup> Transcript of State’s Closing Argument at 11, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. July 21, 2004) (copy on file with author).

<sup>70</sup> *See Stano v. State*, 473 So. 2d 1282, 1285 (Fla. 1985).

<sup>71</sup> *See, e.g., John A. Torres, Tales of a Jailhouse Snitch*, FLA. TODAY, Nov. 26, 2004, at 1A.

<sup>72</sup> *See Martin Dyckman, Infamous Justice*, ST. PETERSBURG TIMES, Aug. 22, 2004, at 1P.

<sup>73</sup> Brief of Appellant at 6, *Stano v. State* (Fla. March 20, 1998) [hereinafter *Stano Brief*]; *available at* <http://www.law.fsu.edu/library/flsupct/92614/92614ini.pdf> (“No physical evidence, contraband, eyewitness testimony, or forensic evidence of any kind connects Petitioner to this or any other homicide.”).

<sup>74</sup> Torres, *supra* note 71.

<sup>75</sup> *Id.* (“Then, a curious thing happened: Stano and Dedge spent just enough time with Zacke for him to testify against them—saying they had confessed their crimes.”); Dyckman, *supra* note 72 (“In both cases, the state needed stronger evidence for retrials. In both cases, Zacke miraculously turned up to say the defendants had boasted of the crimes.”).

<sup>76</sup> *Stano Brief*, *supra* note 73, at 6.

<sup>77</sup> *Id.* at 21 (citation omitted).

<sup>78</sup> *Stano v. Florida*, 708 So. 2d 271, 275 (Fla. 1998).

Stano had confessed.<sup>79</sup> It was of no moment that Stano's confession did not match the crime, or that the conviction hinged upon Zacke's testimony, without which the first jury had refused to convict Stano. Three days after the court's ruling, Stano was electrocuted.<sup>80</sup> In his final statement, Stano exclaimed, "I am innocent. . . . Now I am dead and you do not have the truth."<sup>81</sup>

In August 1984, Zacke took the stand in the trial against Wilton Dedge, *State v. Dedge*, and provided details of the crime that smacked of coaching, details that even Dedge did not know. "He knew more about my case than I did," Dedge observed.<sup>82</sup> Zacke even threw in some fanciful touches: Dedge allegedly confessed to Zacke that he drove his motorcycle over 160 miles per hour to Ms. Smith's house, arriving in fifteen minutes (a nearly fifty-mile trip),<sup>83</sup> and that he was able to commit the crime and return to the garage without anyone noticing his absence.<sup>84</sup> To inflame the jury, Zacke testified that Dedge "never mentioned the girl's name, he just called her a bitch, that's all he ever said, that's the only name I knew . . . ."<sup>85</sup> He added that Dedge threatened to kill Ms. Smith if he was ever released. "So what you're telling us is you'll conspire to kill somebody to keep from going to jail, but you wouldn't lie to get out of jail?" Horwitz asked Zacke on cross-examination.<sup>86</sup> "Maybe hard to believe, yes," Zacke replied.<sup>87</sup> "He was one of the most intelligent witnesses I'd ever seen," said Horwitz, "masterful," even "artistic" on the stand.<sup>88</sup>

Given that Dedge was innocent of the crime, and that Zacke was unequivocally lying, the question arises: where did Zacke obtain his information? Nina Morrison of the Innocence Project, who would later represent Dedge, explained:

When you look at the wealth and type of detail he had, there are only three places that he could have received that information from: Wilton, Wilton's attorneys, or from prosecutors. We know it didn't come from Wilton or his lawyers. It doesn't take a rocket scientist to connect the dots.<sup>89</sup>

Talbot "Sandy" D'Alemberte, the former President of the American Bar Association and of Florida State University, who represented Mr. Dedge in his civil suit against the State of Florida, similarly wondered how Zacke got his information. "[H]ow did Zacke suddenly appear on this van with Wilton," D'Alemberte questioned.<sup>90</sup> "The state attorney said Zacke was going to his own hearing, but a review of the file shows no hearing for Zacke that matches with this time. What the heck is he doing on this van and who put him there?"<sup>91</sup>

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<sup>79</sup> *Id.* at 272.

<sup>80</sup> Dyckman, *supra* note 72.

<sup>81</sup> *Id.*

<sup>82</sup> Dedge Interview, *supra* note 22.

<sup>83</sup> 1984 Transcript, *supra* note 23, at 1214.

<sup>84</sup> *Id.* at 1213-14.

<sup>85</sup> *Id.* at 1213.

<sup>86</sup> *Id.* at 1230.

<sup>87</sup> *Id.*

<sup>88</sup> Horwitz Interview, *supra* note 54.

<sup>89</sup> Torres, *supra* note 71.

<sup>90</sup> Telephone Interview with Sandy D'Alemberte (Oct. 12, 2006) [hereinafter D'Alemberte Interview].

<sup>91</sup> *Id.* The prosecutors have denied any misconduct, noting that Zacke made no demands in return for his testimony against Mr. Dedge. After trial, however, Zacke was granted his two requests: his confiscated

Dedge spent the entire day in the transport van, from 6:30 in the morning until after dark. At the start of the journey, there were four or five other prisoners in the van, Dedge explained.<sup>92</sup> “Then we stopped in a little town, and everyone else got off and boarded another van—even though some of the others were going in the same direction as I was—and Zacke got on. In hindsight, I should have known something wasn’t right.”<sup>93</sup>

Dedge’s alibi witnesses from the auto shop did not testify. Horwitz believed that the gruff appearance of the alibi witnesses, with one witness having a criminal record, had worked against Dedge at the first trial.<sup>94</sup> Dedge again took the stand, however, and forcefully denied the allegations, calling Zacke a bold-faced liar.<sup>95</sup> And once again, defense witnesses challenged the hair evidence. “The experts admitted they couldn’t say that it was Wilton Dedge’s hair,” said Horwitz, “just that it’s a white guy with blond hair, like Wilton.”<sup>96</sup> But that is not what the prosecutor told the jurors. He told the jurors: “*this pubic hair was identical to some of [Dedge’s] hairs, identical in every single respect. . . . So we have hairs from this Defendant that are identical to, in every characteristic, to the pubic hair from this sheet.*”<sup>97</sup> For Dedge to be innocent, the prosecutor added, “you would have to assume there is a man out there who committed this crime . . . and that . . . [this] particular man would have pubic hair *identical to Wilton Dedge . . .*”<sup>98</sup>

The all-male jury deliberated for seven hours and once again found Dedge guilty. In addition, Zacke’s testimony that Dedge had threatened to kill Ms. Smith permitted the judge to increase the sentence: this time, he received a life sentence.<sup>99</sup> Dedge was in shock. “It was like watching everything through a third person,” he explained.<sup>100</sup> “They said I showed no emotion, but they didn’t understand what shock is.”<sup>101</sup>

### C. Year after Year of Futile Hope

It was 1984, and at the age of twenty-two, Dedge was facing the rest of his life in a Florida prison. Following the verdict, Dedge spent nearly two years locked away in solitary confinement, at his own request, preferring the cruel monotony of “solitary” to the horrors lurking beyond the solid steel door to his cell. “If I wanted to avoid rape and abuse,” Dedge explained, “my choice was simple: either stab a guy or go into solitary. I chose solitary.”<sup>102</sup> Separated from the bad but also the meager good—the human contact, noises, smells, shadows, and sunlight that remind us of our humanity—Dedge searched for the strength to keep going. He could always

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truck was returned to his wife, and he was transferred to another prison. Laurin Sellers, *DNA Test Prompts Brevard Man to Seek 3rd Trial*, ORLANDO SENTINEL, July 15, 2002, at A1, available at 2002 WLNR 12808577.

<sup>92</sup> Dedge Interview, *supra* note 22.

<sup>93</sup> *Id.*

<sup>94</sup> Horwitz Interview, *supra* note 54.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> 1984 Transcript, *supra* note 23, at 1659 (emphasis added).

<sup>98</sup> *Id.* at 1659-60 (emphasis added).

<sup>99</sup> LaPeter, *supra* note 20.

<sup>100</sup> Dedge Interview, *supra* note 22.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

choose to go back into the general population at any time. “[I]f you want to get out of solitary” and remain safe, a guard advised him, “you’ve got to go out there and stab somebody.”<sup>103</sup>

With two trials disastrously decided, hope was hard to come by. With the second trial only making things worse, what were the chances of a third trial? Those chances, however slim, continued to keep Dedge alive. Dedge’s parents also held out hope and, with their modest means, took out a second mortgage on their house, depleted their pension, scrimped and saved every penny, and continued to appeal the conviction.<sup>104</sup> “I basically lived from one appeal to the next,” said Dedge.<sup>105</sup> “I knew I wasn’t guilty, so I believed in the system. I had faith that sooner or later I’d get out.”<sup>106</sup>

As the years passed, however, the appeals dried up, and the precious years of young adulthood disappeared with them. Dedge wrote to dozens of lawyers, but none would take his case. In fact, only one of them even bothered to acknowledge his request, declining to assist him.<sup>107</sup> Meanwhile, Dedge read anything he could find to pass the time in solitary, borrowing as many library books as the prison would allow. At least once or twice a month, Dedge’s parents made the long, exhausting trip to visit their son. They did so every month of his confinement, at times traveling over 200 miles from their home.<sup>108</sup>

Finally, in 1986, Dedge secured a transfer to a less dangerous prison facility, a facility in which he would venture out of solitary confinement. To call any of the facilities in which the state confined Dedge “safe,” however, would be absurd. Dedge witnessed stabbings, rapes (“one day, the lights went out, and the back-up generator did not kick on”),<sup>109</sup> and beatings. “You’ve got to be on your toes 24/7,” said Dedge.<sup>110</sup> “You’re always looking over your shoulder, watching what you say and what you do.”<sup>111</sup> Yet it was not the violence but the boredom that posed the greatest challenge. “Every day is the same as the last, week after week, month after month, and year after year. There is nothing to look forward to but the same monotony, day in and day out.”<sup>112</sup>

Dedge did his best to improve himself, stay out of trouble, and stay sane. He took a course in small business management taught by a professor from the community college, earning about thirty credits until the State transferred him to a facility where no such courses were offered. The new facility needed a welder, and Dedge had taken welding courses in prison.<sup>113</sup> Dedge also studied water management and waste disposal, earning licenses in both waste water management and drinking water management. For the last eight years of his incarceration, he ran the water plant at the Cross City Correctional Facility in Cross City, Florida.<sup>114</sup>

#### *D. Enter the Innocence Project*

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<sup>103</sup> *Id.*

<sup>104</sup> G. Dedge Interview, *supra* note 50.

<sup>105</sup> Dedge Interview, *supra* note 22.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> G. Dedge Interview, *supra* note 50.

<sup>109</sup> Dedge Interview, *supra* note 22.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Dedge Interview, *supra* note 22.

In 1988, when Dedge first learned of DNA testing, he wrote the Florida State Attorney's Office requesting that DNA testing be done on the physical evidence in his case. "I knew that DNA testing was my key to the door," said Dedge, "and that if I ever got the evidence tested, I'd be out."<sup>115</sup> The state attorney had the authority and discretion to authorize such DNA tests, but refused to do so.<sup>116</sup>

Six years later, in October 1994, Dedge happened to see the end of a segment on *Good Morning America* featuring Peter Neufeld, co-Director of the Innocence Project in New York. Founded in 1992 by Mr. Neufeld and Barry Scheck (famous for his role as a member of the O.J. Simpson "Dream Team"), the Innocence Project helps ostensibly innocent inmates challenge their convictions using DNA evidence. Intrigued by what he heard, Dedge wondered if the Innocence Project might be able to help him. He decided to write Mr. Neufeld. Dedge knew it was a long shot, but he had written every other lawyer he could think of, so why not one more? In the moving 2006 documentary, *After Innocence*, which highlights the struggles of the wrongfully convicted after release, Dedge read portions of that fateful letter:

Dear Mr. Neufeld, my name is Wilton Dedge and I am very interested in your organization "Innocence Project." I caught the tail end of your interview on the Good Morning America show a few weeks ago. . . . I don't know where else to turn. I tried everything I could to prove my innocence when this first started. When I found out that the police were looking for me, I turned myself in, knowing it was all a mistake and that it would be straightened out. . . . I could write a number of pages telling you how outlandish the case is, but I know you are very busy so I'll close for now. I thank you in advance for your time and any help you can give.<sup>117</sup>

The small staff of attorneys at the Innocence Project was overwhelmed with requests like Dedge's. Even with the help of a small army of law student interns, the Innocence Project receives thousands more requests than it can handle. "We currently have 10,000 cases pending from inmates across the country," said Morrison.<sup>118</sup> Then there is the vetting process. Given their limited resources and the overwhelming demand, the Innocence Project must fully investigate a prisoner's claim, and the potential for a post-conviction appeal, before agreeing to add the case to their docket. This process can take three or four years.<sup>119</sup> Dedge would not have to wait three or four years, however. Appalled by the weakness of the case against Dedge, and hopeful that DNA could help secure his freedom, the Innocence Project agreed to take his case in 1995. Distinguished Florida defense attorney Milton Hirsch agreed to assist as local counsel on a pro bono basis.

In April 1997, Scheck and Hirsch filed a motion to permit DNA testing of the evidence taken from the scene of the crime. This included anal and vaginal swabs taken from the victim

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<sup>115</sup> *Id.*

<sup>116</sup> 2005 Petition, *supra* note 36, at 5.

<sup>117</sup> AFTER INNOCENCE (New Yorker Films 2005) [hereinafter AFTER INNOCENCE].

<sup>118</sup> Interview with Nina Morrison, in New York, N.Y. (Oct. 11, 2006) [hereinafter Morrison Interview].

<sup>119</sup> *Id.*

and the hairs recovered from her bed.<sup>120</sup> They emphasized the weakness of the prosecution's case, particularly the testimony of Preston:

Prosecutors from New York, Florida, and Arizona, as well as Federal Postal Inspectors working in Florida, Ohio, Kentucky, and New York have found Mr. Preston's and his dogs' abilities to be questionable, his claims unfounded, and his testimony unusable. In fact, an internal investigation conducted in 1983 by the Special Investigations Division of the Chief Postal Inspector's office resulted in the recommendation that Mr. Preston should no longer be used by the Postal Inspector's service.<sup>121</sup>

A journalist in Arizona investigated Preston from May 1984 through October 1985, moreover, finding that "Mr. Preston's dogs were clearly wrong in some 40 different incidents, and that, early on, almost no prosecutors had ever conducted background checks of Preston's claims."<sup>122</sup> Results of this investigation were aired on the ABC television program 20/20 after Dedge's second trial had been completed.<sup>123</sup>

And there was more. In 1986, the United States Court of Appeals for the Sixth Circuit reversed the Ohio robbery conviction of Dale Sutton—a conviction based in large measure on Preston's testimony. In reaching its decision, the court explained:

Preston also testified for the government at Sutton's trial. Preston offered testimony both as to his expertise in training and using "scenting" dogs and as to Harass II's training and qualifications as a "scenting" dog. Sutton alleges, and the government does not now contest, that during the course of Sutton's trial Preston testified untruthfully as to his credentials, background, and training, and as to the abilities and ancestry of his German shepherd, Harass II.<sup>124</sup>

Given the paucity of evidence against Dedge, DNA tests were warranted to definitively establish whether he was in fact the perpetrator. The argument was powerful, but there was one formidable problem: at the time, Florida law did not expressly provide a right to DNA testing. Although DNA tests had been around for years—gaining widespread notoriety in the trial of O.J. Simpson in 1995—Florida, like the vast majority of states, had failed to enact legislation to keep pace with this critical new technology.

Florida's rule governing "post-conviction" remedies, Rule 3.850, contained no provision for DNA testing.<sup>125</sup> Under Rule 3.850, a convicted individual is prohibited from making a motion to vacate or set aside his sentence "more than 2 years after the judgment and sentence become

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<sup>120</sup> *Id.*

<sup>121</sup> 1997 Memo, *supra* note 26, at 3 n.1.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Sutton v. Rowland*, No. 84-3785, 1986 U.S. App. LEXIS 19922, at \*3-4 (6th Cir. Jan. 7, 1986) (per curiam). After Dedge's conviction, Preston was also "discredited through an embarrassing field test ordered by a Brevard County judge in another case and the revelation that some of his 'credentials' were bogus." Sellers, *supra*, note 91, at A1. Soundly impeaching his claims in the *Dedge* case and others, Preston was unable to track a scent merely five days old. *Id.*

<sup>125</sup> See FLA. R. CRIM. P. 3.850.

final in a noncapital case . . . .”<sup>126</sup> To obtain relief based on newly discovered evidence under this rule, the Florida Supreme Court required the moving party to meet two requirements: 1) “the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence”; and 2) “the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial.”<sup>127</sup>

Florida’s state attorneys vigorously opposed the motion. They argued that Rule 3.850 did not sanction DNA testing and, even if it did, the DNA testing that Dedge requested had been available “since 1993,” well over two years before his motion.<sup>128</sup> This new evidence was not, or should not have been, unknown to Dedge or his attorneys long before the motion. “He knew about DNA testing and didn’t do anything,” said Robert Holmes, the state attorney who prosecuted Dedge in 1984. He “sat on his hands.”<sup>129</sup>

This was merely the opening volley in a seven-year war that the state attorneys would wage against Dedge and his attorneys in their quest to secure DNA testing and, ultimately, Dedge’s freedom. Never mind that Dedge had spent year after year writing every lawyer he could find to secure further representation, only to be rejected by every one of them, or that when he first learned of the possibility of DNA testing in 1988, he immediately wrote to the state attorney to request the procedure, only to be denied. And never mind that this new miracle test could firmly resolve, once and for all, Dedge’s guilt or innocence, potentially freeing a man who had already spent fifteen years in prison, six of which occurred after the state attorney denied his request for DNA testing. Strict adherence to the proper procedure and the “finality” of the jury’s decision were more important than the search for truth and justice.

“Their position seemed to be, ‘après Wilton, le deluge,’” Hirsch explains.<sup>130</sup> If this prisoner secured DNA tests, then everyone would have to be granted DNA tests. “But this was factually untrue,” Hirsch points out.<sup>131</sup> For the majority of crimes, there is no biological evidence, or it is lost or destroyed after conviction. “More importantly, in Wilton’s case, there was substantial doubt about his guilt, and there was a substantial basis to believe that DNA could prove his innocence. Agreeing to test everyone for whom there is an independent basis to doubt guilt, and readily available DNA evidence, is a good thing.”<sup>132</sup> As for finality, the DNA tests could establish, once and for all, the innocence *or* guilt of the convicted. Indeed, Hirsch points out that

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<sup>126</sup> *Id.* at (b).

<sup>127</sup> *Jones v. Florida*, 591 So. 2d 911, 914-15 (Fla. 1991) (citation and internal quotations omitted).

<sup>128</sup> State’s Response to Defendant’s Motion for Order Releasing Trial Evidence at 2, *State v. Dedge*, No. 82-135-CF-A (Fl. Cir. Ct. July 22, 1997) (copy on file with author).

<sup>129</sup> Watt, *supra* note 20.

<sup>130</sup> Telephone Interview with Milton Hirsch (Sept. 22, 2006) (hereinafter Hirsch Interview).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* Four years later, in adopting an amendment to the Florida Rules of Criminal Procedure permitting post-conviction DNA testing, Florida Supreme Court Justice Anstead echoed these thoughts: “We are hardly opening any floodgates. But, for the rare case that presents a credible claim, we have the unique opportunity to lay to rest, through definitive DNA testing, the concern that a serious miscarriage of justice may have occurred.” Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing) Amendment to Florida Rules of Appellate Procedure 9.140 & 9.141, 807 So. 2d 633, 654 (Fla. 2001) (per curiam) (Anstead, J., concurring in part and dissenting in part).

one of the first three Florida cases to examine DNA evidence after conviction confirmed the inmate's guilt.<sup>133</sup>

In August 1998, the court issued its decision, finding that because the DNA testing Dedge requested "was available in 1993 and the Defendant waited until April 24, 1997 to file his motion for release of evidence for DNA testing, the Defendant's DNA claim is procedurally barred."<sup>134</sup> The Innocence Project appealed the decision to the court of appeal. Surely prisoners stuck in the state penitentiary could not be charged with knowledge of the latest DNA technology<sup>135</sup> and the two-year statute of limitations, particularly where, as here, the prisoner could not even find a lawyer to help him.<sup>136</sup> "[S]uch a holding," the Innocence Project asserted, "would be a monstrous distortion of Rule 3.850(b)(1), and of any notion of fair play."<sup>137</sup>

In December 1998, approaching Dedge's seventeenth year in prison, the court of appeal issued its ruling. In a 2-1 decision, it affirmed the trial court's denial of Dedge's motion without comment.<sup>138</sup> Judge Winifred Sharp issued a strong dissent, emphasizing that "[t]he evidence of Dedge's guilt, other than the victim's testimony, was minimal."<sup>139</sup> Specifically, Judge Sharp observed that the pubic hair from the crime scene "established only that Dedge 'could not be eliminated' as a possible source"; "[a]n inmate who had his sentence reduced from 180 years to 60 years testified Dedge confessed to him"; and "there was testimony that [scent dogs] were *incorrect* 40% of the time."<sup>140</sup> Judge Sharp noted the unfairness of charging Dedge with knowledge of both DNA testing and of the two-year limitation:

Frankly, I think it is a very harsh reading of the two-year time limit in [R]ule 3.850 . . . . DNA testing is a recent, highly accurate, application of scientific principles unknown at the time of Dedge's trial. It is not well known to or understood by most lawyers and judges, I would wager, even in 1998. I think it unfair and unrealistic to expect an indigent, serving two life sentences in prison, to have had notice of the existence of PCR-based testing, and possible application to his case prior to 1995 when it was first discussed by a Florida court.<sup>141</sup>

And she spoke passionately of the injustice of doing so in Dedge's case:

One of my worst nightmares as a judge, is and has been, that persons convicted and imprisoned in a "legal" proceeding, are in fact innocent. If there is a way to

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<sup>133</sup> Hirsch Interview, *supra* note 130.

<sup>134</sup> Order Denying Motion for an Order Releasing Trial Evidence at 3, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. Aug. 25, 1998) (copy on file with author).

<sup>135</sup> See Initial Brief of Petitioner/Appellant at 7, *Dedge v. State*, 723 So. 2d 322 (Fla. Dist. Ct. App. 1998) (No. 82-2503) ("[T]he law does not impose the duty upon any defendant, much less an untutored, incarcerated defendant such as Wilton Dedge, to be diligent in learning of every development in DNA science that might alter his litigation posture.").

<sup>136</sup> *Id.* at 8 ("[F]or a decade Mr. Dedge had no attorney.").

<sup>137</sup> *Id.* at 7.

<sup>138</sup> *Dedge v. State*, 723 So. 2d 322 (Fla. Dist. Ct. App. 1998).

<sup>139</sup> *Id.* at 322 (Sharp, J., dissenting).

<sup>140</sup> *Id.* at 322-23.

<sup>141</sup> *Id.* at 324.

establish their true innocence on the basis of a highly accurate objective scientific test, like the PCR, in good conscience it should be permitted. This case calls out for such relief: the evidence of Dedge's guilt at trial was minimal; the PCR test had not been developed at the time of his trial. . . . [I]f successfully performed, [the test] will likely be absolutely conclusive of either his guilt or innocence. Not to do the testing consigns a possibly innocent man to spend the rest of his life in prison.<sup>142</sup>

Unfortunately, Judge Sharp did not carry the vote in December 1998; on formalistic grounds, the two-judge majority consigned Mr. Dedge to many more years of prison.

### *E. The Inherent Authority of the Court*

Nearly two more years would pass without movement on the case, and seemingly without hope of any movement. The 1998 appellate decision appeared to foreclose any further DNA testing, and thus any further proceedings to prove Mr. Dedge's innocence. But Wilton's legal team had not given up hope. Notwithstanding the 1998 decision, Hirsch called upon Brevard Circuit Court Judge Bruce W. Jacobus to exercise the court's "inherent authority to permit the release of certain evidence for the purpose of conducting DNA testing."<sup>143</sup> Hirsch argued that Dedge was not seeking to overturn or vacate his conviction, but merely to obtain DNA testing that "might support an application for executive clemency."<sup>144</sup>

It was a long shot, but it worked. On June 16, 2000, Judge Jacobus ordered release of the evidence to ReliaGene Technologies for DNA testing, over the state attorneys' vehement objections.<sup>145</sup> This was the first ruling of its kind in Florida history.<sup>146</sup> The results, however, would not be available any time soon. The laboratories that conduct DNA tests have always faced large backlogs, with the average case requiring five or six months for a result. In addition, Dedge and his team had decided to test the vaginal and anal swabs from the rape kit first. After awaiting the outcome, they learned that the samples were too degraded to procure results under the existing technology; they were thus forced to request a mitochondrial DNA test on the pubic hairs.<sup>147</sup>

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<sup>142</sup> *Id.*

<sup>143</sup> Defendant's Amended Motion for Release of Certain Evidence for the Purpose of Conducting DNA Testing at 2, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. June 8, 2000) (citing *Garnire v. Red Lake*, 265 So. 2d 2, 4-5 (Fla. 1972) ("[C]riminal courts may fashion [measures] within their inherent powers to provide necessary procedures and processes for the recovery of evidentiary items held by them.")) (copy on file with author); *Miami Herald Publ'g Co. v. Collazo*, 329 So. 2d 333, 336 (Fla. Dist. Ct. App. 1976) ("Every court has the inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions.").

<sup>144</sup> Defendant's Amended Motion for Release of Certain Evidence for the Purpose of Conducting DNA Testing, *supra* note 143, at 3.

<sup>145</sup> Order Granting Defendant's Motion for Release of Certain Evidence for the Purpose of Conducting DNA Testing at 1, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. June 16, 2000) ("Under the very unique factual circumstances of this case, the Court will exercise its inherent authority to release specified evidence for purposes of DNA testing which was not a readily available technology at the time of the Defendant's trial or appeals. . . .") (copy on file with author).

<sup>146</sup> Morrison Interview, *supra* note 118.

<sup>147</sup> *Id.*

(Mitochondrial DNA is contained in the cytoplasm of the cell, rather than the nucleus, and is passed by a mother to both male and female offspring.) This is an expensive test, however, and before the test could be conducted, Dedge's team was required to raise the necessary funds.<sup>148</sup> Just like that, another year of life was forfeited—or worse, it was relegated to the torture of prison.

In June 2001, the results were in: the pubic hair recovered at the crime scene did not belong to Dedge.<sup>149</sup> Since the victim had testified that only she, her sister (who shared the same mitochondrial DNA), and the perpetrator had ever been in her bed,<sup>150</sup> there could be no doubt that Wilton Dedge was innocent of the crime. Dedge's team again moved under Rule 3.850—yes, *that* Rule 3.850—to have his conviction overturned based on this new evidence. Unlike his first post-conviction motion, Dedge now possessed conclusive evidence of his innocence.

"It took three years just to secure the right to get the evidence tested," said Hirsch, "and another year to secure the results. But when the results came back, I thought, we're done here, because clearly he's innocent."<sup>151</sup> But they were far from done. Despite the conclusive DNA test results, the Florida Attorney's Office again opposed the motion on the grounds that it was time-barred.<sup>152</sup> "Rules are rules," said state attorney Holmes, and "[i]t would be a nightmare if old cases were reopened. There is a need for finality."<sup>153</sup>

"The first three years that they fought to prevent the test, I was disappointed with the state attorneys' actions," Hirsch explains.<sup>154</sup> He adds:

But after the DNA results came back, I thought, this is Kafkaesque. It was obvious to the prosecutors that Wilton was innocent. They didn't care and they said they didn't care. As a former prosecutor, I was horrified that they said his innocence didn't matter and that he had no remedy. If anything, they redoubled their efforts to prevent Wilton from gaining his release.<sup>155</sup>

The twenty-year anniversary of Dedge's incarceration came and went.

In March 2002, Brevard County Judge Preston Silvernail denied Dedge's motion, agreeing with the state attorneys that, under Florida Supreme Court precedent, it was too late.<sup>156</sup>

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* ReliaGene Technologies, which conducted the DNA testing, reported: "Wilton Dedge is excluded as the DNA donor." John A. Torres, *Can DNA Set This Man Free?*, FLA. TODAY, July 18, 2004, at 4, available at 2004 WLNR 23210128.

<sup>150</sup> See *infra* note 182 and accompanying text.

<sup>151</sup> Hirsch Interview, *supra* note 130.

<sup>152</sup> State's Response to Defendant's Motion to Vacate Judgment and Sentence at 2, *State v. Dedge*, No. 82-135-CF-A, (Fla. Cir. Ct. Dec. 20, 2001) ("[H]e is procedurally barred from filing this successive motion.") (copy on file with author).

<sup>153</sup> Watt, *supra* note 20.

<sup>154</sup> Hirsch Interview, *supra* note 130.

<sup>155</sup> *Id.*

<sup>156</sup> Order Denying Defendant's Motion to Vacate Judgment and Sentence, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. March 18, 2002) (copy on file with author). Anomalously, Judge Silvernail also ruled that even if the motion were not time-barred, and even if the DNA tests confirmed that the pubic hairs recovered from the victim's bed were not Dedge's, he would still not be entitled to post-conviction relief.

The Court finds that there is not a reasonable probability that the outcome of the trial would have changed had the new test results been introduced at trial showing that the pubic hair(s)

Dedge's team appealed the ruling to the court of appeal, the same court that had denied the 1997 motion for testing by a 2-1 vote. Now, four years later, there was a critical difference: in October 2001, the Florida State Legislature enacted Criminal Rule 3.853, establishing a right to post-conviction DNA testing within two years of sentencing or, for all older cases, by October 1, 2003.<sup>157</sup> The new rule also provided that a motion based on the evidence obtained is to be treated as raising a claim of newly discovered evidence.<sup>158</sup> Dedge's case helped inspire the new law.

In November 2002, the Fifth District Court of Appeal unanimously affirmed Judge Silvernail's denial under Rule 3.850, but ruled that Wilton had a right to file a new motion under Rule 3.853.<sup>159</sup> Judge Sharp, the lone voice of reason in the 1998 appellate decision, now found herself part of a unanimous majority. "Finally," she observed, "the Legislature has provided a limited remedy for convicted persons to seek to exonerate themselves by resort to DNA evidence . . . which the courts have not done."<sup>160</sup> She warned Dedge to adhere strictly to the two-year limitation period, however, "since at this point, arguments based on due process and fundamental fairness have not succeeded in this state."<sup>161</sup>

#### F. Innocence Is Irrelevant

Dedge's team immediately filed a new motion before Judge Silvernail. The state attorneys opposed the motion on classic "Catch 22" grounds: the DNA testing on the hair had not technically been obtained pursuant to Rule 3.853, because the rule had not yet been enacted. Dedge's motion should not be "treated as raising a claim of newly-discovered evidence"<sup>162</sup> under the rule, they argued, since the DNA test was not secured pursuant to Rule 3.853.<sup>163</sup> If he had actually waited a year, he could have availed himself of the new rule.<sup>164</sup> But because he secured the DNA test before the rule came into effect, he should be denied any relief. This, despite the fact that Dedge's case had inspired the new law. "You couldn't make this stuff up," said Morrison.<sup>165</sup>

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recovered from the victim's bed sheets did not belong to the Defendant. The victim identified the Defendant as the perpetrator and adamantly testified that he, not his brother, raped her. The victim made this identification several times . . . . *Id.* at 4.

<sup>157</sup> Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing) Amendment to Florida Rules of Appellate Procedure 9.140 & 9.141, 807 So. 2d 633 (Fla. 2001).

<sup>158</sup> *Id.* at 635; Fla. R. Crim. P. 3.853(d)(2) ("A motion to vacate filed under rule 3.850 or a motion for postconviction or collateral relief filed under rule 3.851, which is based solely on the results of the court-ordered DNA testing obtained under this rule, shall be treated as raising a claim of newly-discovered evidence . . . .").

<sup>159</sup> *Dedge v. State*, 832 So. 2d 835 (Fla. Dist. Ct. App. 2002).

<sup>160</sup> *Id.* at 836 (Sharp, J., concurring).

<sup>161</sup> *Id.* at 837.

<sup>162</sup> State's Response to Defendant's Motion for Post-Conviction Relief Based on DNA Testing at 1-2, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. March 26, 2003) (citation and internal quotations omitted).

<sup>163</sup> *See id.*

<sup>164</sup> Carl Hiaasen, *Still Behind Bars, Despite DNA Evidence*, MIAMI HERALD, May 9, 2004, at L1, available at 2004 WLNR 19420712.

<sup>165</sup> Morrison Interview, *supra* note 118. In his responsive papers, Hirsch commented, "[s]uch a position seems harsh and illogical to a degree to be found only in Kafka's *The Trial*, never in the courts of

In June 2003, Judge Silvernail ruled that the DNA results were admissible, just as the Fifth District Court of Appeal had directed in its November 2002 decision.<sup>166</sup> “There is a reasonable probability that the Defendant would have been acquitted had the evidence been admitted at trial,” Silvernail opined.<sup>167</sup> It appeared that Wilton would have his new trial and soon, he believed, his freedom. In fact, might the State agree to free him, given his manifest innocence, rather than subject him to another trial? It would not. To the contrary, the State appealed Judge Silvernail’s decision, a frivolous appeal given that the judge was merely following the appellate court’s explicit instructions on the matter. In his papers opposing the State’s appeal, Hirsch fulminated:

The State’s legal advisors have submitted a 17 page brief, . . . have demanded this Court’s time and attention, have added to the days and weeks and months that Wilton Dedge will spend behind bars, all in defense of the incarceration of a man *whose innocence they have entirely ceased to contest*. Such conduct on behalf of the State’s legal advisors is . . . but words are so terribly inadequate. Shameful? Monstrous? Orwellian?<sup>168</sup>

“We lost another year of Wilton’s life litigating an issue that the State had already lost,” Morrison explains.<sup>169</sup> *After Innocence* contains footage of Dedge in prison during this period. We see him in handcuffs and leg cuffs, led by a guard to meet with Morrison to discuss the prospects on appeal. Ever glancing downward, his large, sullen, deliberate eyes seem to cower, projecting sadness and a broken despondency that words cannot convey.<sup>170</sup> “You quit getting your hopes up after a while,” Dedge later reflected.<sup>171</sup> “I really didn’t have much faith any more. By this point, my feelings were, when I’m out of the gates, I’ll believe it.”<sup>172</sup>

At oral argument on appeal in early 2004, Judge David Monaco of the Fifth District Court of Appeal appeared perplexed by the State’s position: “Why hasn’t this guy been given a new trial? Why is the State standing in the way?”<sup>173</sup> Judge Emerson Thompson then interjected: “Let me ask you a hypothetical question. If you knew with 100 percent certainty that this man was absolutely innocent, would that change your position in this case?”<sup>174</sup> “No,” the State Assistant Attorney General responded, “[t]hat is not the issue.”<sup>175</sup> At that moment, says Hirsch, “the judge’s jaw dropped open. It was the first time I had ever seen that in all my years of

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justice of Florida.” Defendant’s Reply to State’s Response to Defendant’s Motion for Post-Conviction Relief at 4, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. April 7, 2003) (copy on file with author).

<sup>166</sup> Order Granting Defendant’s Motion for Postsentencing DNA Testing at 9, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. June 23, 2003) (copy on file with author).

<sup>167</sup> *Id.* at 5.

<sup>168</sup> Brief of Respondent/Appellee at 17, *State v. Dedge*, No. 5D03-2238 (Fla. Dist. Ct. App. Jan. 28, 2004).

<sup>169</sup> Morrison Interview, *supra* note 118.

<sup>170</sup> AFTER INNOCENCE, *supra* note 117.

<sup>171</sup> Dedge Interview, *supra* note 22.

<sup>172</sup> *Id.*

<sup>173</sup> Hiaasen, *supra*, note 164, at L1.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

practice.”<sup>176</sup> “If I hadn’t been in the courtroom at the time,” Morrison adds, “I would not have believed that it happened. You could have heard a pin drop.”<sup>177</sup>

In April 2004, the court of appeal affirmed Silvernail’s decision.<sup>178</sup> Three months later, Dedge and his team were back before Judge Silvernail to request a new trial based upon the exculpatory DNA evidence. Refusing to consent to a new trial, the state attorneys pulled out all the stops in opposing the request. Even under the new rule, state attorney Holmes and his colleague argued, Dedge should not be granted a new trial. Holmes is the attorney who, twenty years earlier, had relied upon the pubic hair to secure Dedge’s conviction, telling the jury that it was “identical in every single respect” to Dedge’s,<sup>179</sup> and that to acquit Dedge, the jury would have to assume that the real perpetrator had “pubic hair identical to Wilton Dedge.”<sup>180</sup> Now he was arguing that the hair was irrelevant. As his colleague explained, the fact that it did not match Wilton’s hair proved nothing:

They’ve got a hair that could have come from God knows where, and it’s not Wilton Dedge’s, and we ought to just say, let that man walk. Let the citizens of Brevard County find out if he really is a rapist, whether he really assaults people in the way that he did here. Let’s find out the hard way is what [Morrison] tells you. . . . [B]ut let me tell you, pubic hair is around, too. Just go into the urinal down there at the end of the hall and take a look. It’s there. It gets pulled out. . . . [T]here deserves to be some finality for victims, for the community, for everybody. . . . These people don’t have to be fair. They aren’t fair. They don’t want to be fair. This is “Project Innocence.”<sup>181</sup>

The victim had stated that only she, her sister, and the rapist had ever been in her bed.<sup>182</sup>

The state attorneys then brought in the victim’s father, twenty-two years after the crime, to proffer a brand new theory to explain the presence of the pubic hair in the victim’s bed. Two weeks before the crime, Mr. Smith testified, his daughter had purchased a new dresser, and two men had moved the dresser into her room.<sup>183</sup> The pubic hair in Ms. Smith’s bed might have come from one of these men. “We were tempted to ask on cross-examination if the job was performed by the ‘Naked Movers of Central Florida,’” says Morrison, “but this was no laughing matter. It was yet another example of the absurd lengths to which the State was willing to go to keep an innocent man in prison.”<sup>184</sup>

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<sup>176</sup> Hirsch Interview, *supra* note 130.

<sup>177</sup> Morrison Interview, *supra* note 118.

<sup>178</sup> State v. Dedge, 873 So. 2d 338 (Fla. Dist. Ct. App. 2004).

<sup>179</sup> See *supra* note 97 and accompanying text.

<sup>180</sup> See *supra* note 98 and accompanying text.

<sup>181</sup> Transcript of State’s Closing Argument, *supra* note 69, at 4, 9, 11-12, and 15. Much of this speech, in all of its ironic poignancy, is captured in the film *After Innocence*. AFTER INNOCENCE, *supra* note 117.

<sup>182</sup> Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, N.Y. TIMES, Aug. 29, 2003, at A1 (“Though the victim said that only she, her sister and the rapist could have left the hairs in her sheets, the tests excluded the sisters and Mr. Dedge.”).

<sup>183</sup> Morrison Interview, *supra* note 118.

<sup>184</sup> *Id.*

Even without the hair evidence, “[t]here’s a great deal of other evidence,” the state attorney continued,<sup>185</sup> including, he emphasized, the testimony of Zacke or Preston.<sup>186</sup> A sense of irony again saturated the courtroom: Norm Wolfinger, head of the Brevard County State Attorney’s Office, was a former public defender who had seen his own innocent client sentenced to death based on the testimony of Preston in 1982. Mr. Wolfinger’s client, Juan Florencio Ramos, spent five years in prison, four of them on death row, for a murder he didn’t commit.<sup>187</sup> There was no physical evidence linking Ramos to the crime, only the damning “testimony” of Harass II.<sup>188</sup> After sniffing a pack of cigarettes from Ramos, the dog allegedly detected his scent on the victim’s blouse, among four others in the line-up. As the Florida Supreme Court later noted, “[t]he victim’s shirt was the only one that had been worn by a female and was the only shirt with blood on it.”<sup>189</sup> Then, faced with five knives, Harass II licked the knife used in the murder. It was the only knife with blood—i.e. food—on it (just as Ms. Smith’s sheets were the only sheets with blood on them in the *Dedge* lineup).<sup>190</sup> Based upon this scent “identification,” Ramos was sentenced to die.<sup>191</sup>

Ramos’ freedom was secured, in part, because of the 1985 exposé on 20/20 revealing that Harass II and other scent dogs routinely misidentified suspects.<sup>192</sup> “I think Preston has gone beyond the bounds of what other people think is reasonable,” Wolfinger said at the time, adding, “I wouldn’t want my life to depend on what that dog says.”<sup>193</sup> Decades later, Wolfinger’s attorneys were arguing that Wilton Dedge’s life should depend on what the very same dog had said.

For their final act, the state attorneys dropped a bombshell: they moved to have the semen from the crime scene tested before granting a new trial.<sup>194</sup> “The problem is that hair does not have to be from the perpetrator,” they argued.<sup>195</sup> “The semen that he left does.”<sup>196</sup> After fighting against the DNA tests for more than seven years, the State now demanded that further DNA tests be conducted to “back up” the mitochondrial DNA test.<sup>197</sup> Under the technology available in 2000, the semen samples could not be tested, but a new method of DNA testing, called “Y chromosome” testing, might well produce results. Judge Silvernail said, “I feel like I’ve been thrown a curveball on this a little bit,”<sup>198</sup> but he ultimately ordered the new tests.<sup>199</sup> There would be no trial until the new results were in. It was back to prison for Dedge.

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<sup>185</sup> Transcript of State’s Closing Argument, *supra* note 69, at 18.

<sup>186</sup> *Id.* at 10, 15-19.

<sup>187</sup> Sydney P. Freedberg, *Florida’s Wrongly Convicted Condemned/Freed from Death Row*, ST. PETERSBURG TIMES, July 4, 1999, at 1A.

<sup>188</sup> *Id.*

<sup>189</sup> Ramos v. State, 496 So. 2d 121, 122 (Fla. 1986).

<sup>190</sup> *Id.*

<sup>191</sup> Freedberg, *supra* note 187.

<sup>192</sup> *Id.*

<sup>193</sup> Alex Beasley, *Legal Foes Differ on Value of Dog’s Nose*, ORLANDO SENTINEL, Jan. 30, 1984, at C1, C4.

<sup>194</sup> AFTER INNOCENCE, *supra* note 117.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Transcript of State’s Closing Argument, *supra* note 69, at 5.

<sup>198</sup> *Id.*

As its name suggests, the Y chromosome test isolates genetic markers on the Y chromosome, which only men possess. Unlike mitochondrial DNA, these markers are passed from father to son.<sup>200</sup> At the time, scientists were able to look at eleven of these markers (they are now able to examine seventeen).<sup>201</sup> The key in any such tests is to secure enough markers from the strand of DNA to conclusively determine if there is or is not a match, for any individual might coincidentally share a few random markers with another. Any markers that do not match, however, automatically rule out a suspect. The great fear was that the sample was so small and degraded that no markers could be extracted, or worse, that a marker or two might randomly match with Dedge. The latter was unlikely, but given the macabre twists in the case to this point, there was ample cause for concern.

ReliaGene Technologies began testing on July 29, 2004, promising to deliver expedited results within ten working days—a dramatic improvement on the normal waiting time for DNA testing.<sup>202</sup> This time, money was not an issue: since the State had requested the test, the State would bear the costs.<sup>203</sup> On August 11, 2004, the results were in. Scientists were only able to extract four markers, but Dedge was ruled out on two of them (as were all of his paternal relatives).<sup>204</sup> To no one's surprise, the DNA evidence again proved conclusively that he was not the rapist. "I didn't know whether to laugh or cry," said Dedge.<sup>205</sup> "I ended up laughing, because I couldn't cry in front of hardened cons."<sup>206</sup>

### G. Free at Last

On August 12, 2004, the State of Florida released Wilton Dedge after twenty-two years of wrongful incarceration, at two o'clock in the morning. If prison is torture, then the State of Florida had tortured this innocent man for twenty-two straight years. To show their contrition, state authorities provided Dedge absolutely nothing upon release.<sup>207</sup> Since he was technically awaiting his results in jail, rather than prison, the State did not even give him the one-hundred dollars given to released prisoners.<sup>208</sup> And since technically he was not a convicted felon, he did not receive the job training and post-release assistance provided all other releasees.<sup>209</sup> In fact, Dedge did not even have clothes to wear when he left jail. After visiting her son earlier in the day,

<sup>199</sup> Order Granting State's Request for DNA Testing on Semen on Anal Smear Slide, *State v. Dedge*, No. 82-135-CF-A (Fla. Cir. Ct. July 23, 2004) (copy on file with author).

<sup>200</sup> Morrison Interview, *supra* note 118.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See Order, *supra* note 199 ("The State of Florida . . . shall bear all costs . . .").

<sup>204</sup> Morrison Interview, *supra* note 118; Forensic Test Results Report #2, ReliaGene Technologies, Aug. 11, 2004 ("Wilton Dedge and all his paternal relatives are excluded as the DNA donor in [the relevant sample].") (copy on file with author).

<sup>205</sup> Dedge Interview, *supra* note 22.

<sup>206</sup> *Id.*

<sup>207</sup> See Beth Kassab, *Innocent Ex-Con Wants State to Pay*, ORLANDO SENTINEL, Mar. 24, 2005 (noting that Dedge left jail "without so much as a bus ticket home").

<sup>208</sup> Laurin Sellers, *Cleared Man Leaves Prison with Nothing*, ORLANDO SENTINEL, Sept. 12, 2004, at A1.

<sup>209</sup> *Id.* ("He didn't receive the counseling or job referrals or temporary housing the state offers paroled murderers, rapists and thieves.").

Mary Dedge returned home and gathered up her husband's clothes and shoes so that Dedge could finally walk into freedom.<sup>210</sup>

In another ironic twist of unbridled proportions, the State Attorney's Office took the credit for freeing Dedge, blaming Dedge's lawyers for resisting DNA testing and forcing Dedge "to languish in prison."<sup>211</sup> "The bottom line is they had evidence that could exonerate him and two months ago they objected to it being tested," Wolfinger told the press.<sup>212</sup> "If it weren't for [the State Attorney's] office asking for this DNA test, he might still be in jail for years. I'm proud of this office for having that test done."<sup>213</sup>

Dedge had requested DNA testing of the evidence in 1988.<sup>214</sup> The State Attorney's Office denial of that request consigned him to sixteen more years in jail.

To this day, none of the prosecutors has apologized to Dedge in person, a fact that still burns. Wolfinger apologized in the press the day of Dedge's release and wrote Dedge a letter of apology, but as Dedge and his family note, he wasn't even one of the prosecutors who put Dedge behind bars for twenty-two years.<sup>215</sup> Those prosecutors have yet to extend Dedge an apology. "I was brought up to believe you respect the law and what it stands for," said Dedge Sr., "and I do. But I have no respect for the state attorneys. They should be disbarred, and they should spend time in jail. I don't know how they look themselves in the mirror."<sup>216</sup> Dedge Sr. is not a man given to hyperbole. "I think if they want to be man enough to call me a rapist," said Wilton Dedge, "then they ought to be man enough to come in person, to my face, and apologize to me and my family. That's the least they could have done."<sup>217</sup>

#### *H. The Quest for Compensation*

Dedge emerged from twenty-two years of prison without a cent to his name, without a job or any job prospects, without health coverage, a college degree, or even clothes of his own. His parents were not in great financial shape either. Legal battles spanning more than two decades had caused significant financial hardship. To pay for their son's defense, his appeals, prison spending money, exorbitant phone bills from collect prison calls, and even the DNA tests, the Dedge family had scraped and borrowed, taking a second mortgage on their home, depleting Dedge Sr.'s entire pension fund, and paying \$17,000 in penalties alone for the early withdrawals.<sup>218</sup> Dedge's father would be forced to work years beyond his planned retirement age.<sup>219</sup>

The State of Florida offered absolutely no compensation for stealing twenty-two years of this man's life, and much of his parents' lives as well. Florida—like so many other states across the country—has no law or procedure for compensating wrongfully convicted and imprisoned

<sup>210</sup> Telephone Interview with Mary Dedge (Nov. 5, 2006).

<sup>211</sup> LaPeter, *supra* note 20.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Dedge Interview, *supra* note 22.

<sup>215</sup> *Id.*; G. Dedge Interview, *supra* note 50.

<sup>216</sup> G. Dedge Interview, *supra* note 50.

<sup>217</sup> Dedge Interview, *supra* note 22.

<sup>218</sup> Randy Shultz, *No Law for 'Taking' of Man's Life*, PALM BEACH POST, Apr. 3, 2005.

<sup>219</sup> G. Dedge Interview, *supra* note 50.

individuals,<sup>220</sup> and neither state officials nor state legislators were keen to change that. It was quite possible that Dedge and his family would receive nothing for their torturous odyssey.

That is when Sandy D'Alemberte, *eminence gris* of the Florida bar, stepped in. Special Counsel to Hunton & Williams and former President of the American Bar Association and Florida State University, Mr. D'Alemberte is as accomplished and esteemed a lawyer as you will find in the State of Florida, or just about anywhere else. He is also a former legislator and, until 2006, served as President of the Florida Innocence Initiative, Florida's version of the Innocence Project. In 2004, he agreed to represent Dedge on a pro bono basis in his quest for compensation.

D'Alemberte's strategy was two-fold: if need be, he would file suit against the State of Florida for wrongful conviction and imprisonment, but he would also utilize his significant contacts and good standing with the Florida Legislature to lobby for a bill to compensate Dedge for all that the state put him through.<sup>221</sup> This was an egregious case, and it would be nice if the State agreed to pay rather than force Dedge to pursue even more litigation. "He was a remarkably good citizen in prison," said D'Alemberte, "with no major disciplinary reports during twenty-two years of incarceration."<sup>222</sup> Among other things, D'Alemberte noted, Dedge had worked for the state: he ran a waste water plant for one of the prisons for eight years. "The state would have to pay for this," D'Alemberte concluded.<sup>223</sup>

To assess the value of Dedge's claim, D'Alemberte commissioned an economic study of the losses occasioned by the wrongful conviction. The study, by three eminent labor economists, looked at such factors as lost wages, lost social security payments (unable to work, Dedge had made absolutely no payments into the system), services rendered to the State in prison, and the money Dedge's parents expended over the years, with interest.<sup>224</sup> "To be conservative," D'Alemberte explained, "we didn't even factor in his skills, even though he had them."<sup>225</sup> The final report assessed the economic losses to Dedge and his family, with interest, at \$2,582,000. This figure did not include "the costs associated with the loss of liberty and reduced quality of life suffered by Mr. Dedge and his family," i.e., the twenty-two years of torture.<sup>226</sup>

D'Alemberte presented his report to state officials, seeking a total of \$4.9 million in compensation for the economic losses (as calculated by the experts) together with the "loss of liberty."<sup>227</sup> Florida's Speaker of the House, Allan Bense, suggested that Dedge file suit rather than seek compensation from the Legislature. Dedge should "explore all the local options before all the taxpayers of Florida participate," he argued.<sup>228</sup> "It's our policy."<sup>229</sup> But there was no policy for

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<sup>220</sup> Martin Dyckman, *Find a Way to Compensate Dedge, Now*, ST. PETERSBURG TIMES, Feb. 20, 2005 ("Unlike 19 other states . . . Florida has no law, rule, or precedent for compensating someone like Dedge."); Shultz, *supra* note 218 ("Florida has no law to compensate the wrongly convicted . . ."); *Justice After Prison: Fair, Straightforward Compensation for the Innocent*, DAYTONA BEACH NEWS-J., Apr. 29, 2008, at 0A4 ("As cases nationwide are overturned by DNA evidence, states have set up automatic programs that provide a quick, dignified compensation process to victims of wrongful convictions. Florida, which leads the nation in exonerations, needs such a process.").

<sup>221</sup> D'Alemberte Interview, *supra* note 90.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> D'Alemberte Interview, *supra* note 90.

<sup>227</sup> *Id.*

<sup>228</sup> Dyckman, *supra* note 72.

seeking and obtaining compensation for wrongful conviction in Florida. “Doesn’t that have a familiar ring to it?” *St. Petersburg Times* columnist Martin Dyckman observed.<sup>230</sup> “Fairness doesn’t matter. Rules do. Even if there are no rules.”<sup>231</sup>

In April 2005, a House Committee recommended that the State offer Dedge no more than \$200,000.<sup>232</sup> D’Alemberte’s attempt to negotiate a fair settlement proved fruitless, and the Legislature ended its session on May 6, 2005 without authorizing a dime for Dedge.<sup>233</sup> On May 27, 2005, D’Alemberte filed suit against the State. It was a long shot based upon any statute (for there was none), but upon the “all writs” authority of the court.<sup>234</sup> “In the absence of legislative relief,” D’Alemberte’s papers explained, “any remedy is dependent on extraordinary equitable proceedings.”<sup>235</sup> The failure to provide such proceedings, D’Alemberte argued, would violate the Florida Constitution, which states: “[t]he courts shall be open to every person for redress of any injury.”<sup>236</sup> D’Alemberte argued that Dedge deserved redress for the taking of his liberty.

While Judge William Gary of Leon County, Florida considered the State’s motion to dismiss the case, Dedge took whatever employment he could find given his skill set and lack of work history, including landscaping and home improvement. And he continued to adjust to a life of freedom. For twenty-two years, he was denied virtually every right and every comfort, including the right to make the minutest decisions for himself. “You’re told what to do, when to do it, and how to do it every day,” said Dedge.<sup>237</sup>

“When I brought him home,” said Dedge Sr., “he asked me, ‘can I go outside and smoke?’ I told him, you are a free man, and you don’t have to ask anybody’s permission.”<sup>238</sup> Everything was new to Dedge, from cell phones to computers, emails to DVDs, to say nothing of the massive social and cultural changes. Waiting for his father in a supermarket parking lot, Dedge explained, he spent thirty minutes just trying to figure out how to turn on the car radio. “Those new dashboards have so many buttons crammed onto one small space,” he said.<sup>239</sup>

Above all, Dedge enjoyed being outdoors. “Just seeing the night sky was great. The open space, the stars . . . . For twenty-two years, I couldn’t look more than twenty feet without seeing a fence or bars.”<sup>240</sup> Not surprisingly, Dedge now works full-time in landscaping, a job that allows him to enjoy the Florida sky without limitation.

In August 2005, Judge Gary dismissed the lawsuit, ruling that the State of Florida enjoyed sovereign immunity from such lawsuits.<sup>241</sup> Unless the Legislature agreed to waive that

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Shultz, *supra* note 218. Florida State Representative David Simmons explained, “[w]e’re not in the business of providing a lottery to someone who’s been wrongfully convicted.” Jackie Halifax, *Senate to Look at Compensation for Wrongly Convicted*, ASSOC. PRESS, Feb. 9, 2005.

<sup>233</sup> Laurin Sellers, *Legislature Shuns Cleared Inmate*, ORLANDO SENTINEL, May 23, 2005, at 10B.

<sup>234</sup> 2005 Petition, *supra* note 36, at 1.

<sup>235</sup> *Id.* at 15.

<sup>236</sup> *Id.* (quoting Fla. Const. art. I, § 21).

<sup>237</sup> Dedge Interview, *supra* note 22.

<sup>238</sup> G. Dedge Interview, *supra* note 50.

<sup>239</sup> Dedge Interview, *supra* note 22.

<sup>240</sup> *Id.*

<sup>241</sup> *Do the Right Thing for Dedge*, ST. PETERSBURG TIMES, Sept. 2, 2005, available at [http://sptimes.com/2005/09/02/Opinion/Do\\_the\\_right\\_thing\\_fo.shtml](http://sptimes.com/2005/09/02/Opinion/Do_the_right_thing_fo.shtml).

immunity by passing a law specifically allowing the wrongfully convicted to seek compensation from the State, the State could not be sued. “While everyone is in agreement that what happened to Wilton Dedge is tragic,” the judge opined, “only the Legislature can address the issue of compensation under existing law.”<sup>242</sup> The Legislature told Dedge to seek compensation in court, and now the court was telling Dedge to take it up with the Legislature. Morrison was right: you really couldn’t make this stuff up.<sup>243</sup>

Now that Dedge had exhausted his legal options, the Legislature could no longer deflect his plea for compensation. The longer they did so, moreover, the longer this wound, this indictment of the Florida judicial and prosecutorial system, would fester. When the Legislature returned to session, several lawmakers, including Senator Mike Haridopolos (R-Indian River), Senator Daniel Webster (R-Winter Garden), and Representative John Quinones (R-Kissimmee), sponsored a bill to provide Dedge with two million dollars, along with free tuition and fees at any State university.<sup>244</sup> Passed by the Legislature and signed by Governor Jeb Bush on December 14, 2005, the law acknowledged Dedge’s “valuable services for the state” and the “significant expenses” his parents incurred in establishing his innocence.<sup>245</sup> The law made no mention of the seven-year battle the State waged to resist DNA testing and exoneration, or the fact that Dedge was released three years after the DNA evidence had established his innocence. The lawmakers did, however, acknowledge that “the state’s system of justice yielded an imperfect result with tragic consequences.”<sup>246</sup>

“For 22 years, Wilton Dedge was wrongfully denied one of his basic rights as an American: his liberty,” Senator Webster commented.<sup>247</sup> “While no amount of money will ever fully compensate Mr. Dedge, today the Senate voted to put justice and compassion above politics and allow the Dedge family to finally move on with their lives.”<sup>248</sup> For blocking the earlier passage of this legislation, Speaker Bense apologized to Dedge.<sup>249</sup> Governor Jeb Bush, after signing the bill in Tallahassee, flew into a small airport near Dedge’s home for a ceremonial signing of the bill, and to apologize to Dedge.<sup>250</sup> Dedge explains that then-Governor Bush told him, “I was not in office at the time, but I wish to extend my apologies for the wrong that was done to you.”<sup>251</sup>

### I. Zacke/Preston Postscript

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<sup>242</sup> Victor Thompson, *Judge Kicks Dedge’s Case*, FLA. TODAY, Aug. 30, 2005, available at <http://www.nlada.org/DMS/Documents/1125593964.01/archives>.

<sup>243</sup> Morrison Interview, *supra* note 118.

<sup>244</sup> S. 12-B, Spec. Sess. B (Fla. 2005).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Press Release, Florida State Senator Mike Haridopolos (Dec. 8, 2005) (copy on file with author).

<sup>248</sup> *Id.*

<sup>249</sup> Carol Marbin Miller, *Wrongly Convicted Man to Get \$2 Million for His Prison Ordeal*, MIAMI HERALD, Dec. 10, 2005, available at <http://www.miltonhirschpllc.com/docs/Miami%20Herald.pdf>.

<sup>250</sup> See John Kennedy & Laurin Sellers, *Governor Approves \$2 Million for Dedge*, ORLANDO SENTINEL, Dec. 15, 2005.

<sup>251</sup> G. Dedge Interview, *supra* note 50.

When Clarence Zacke took the stand in 1983, he explained that he came forward to testify in order to protect womanhood.<sup>252</sup> He could not stand by silently while Dedge threatened to harm Ms. Smith. Although Zacke was originally sentenced to 180 years in jail, the assistance he repeatedly provided the Florida State Attorney's Office allowed him to be released from prison in 2004. The fact that his lies had sent one man to the electric chair and another to prison for twenty-two years would not derail his release: the statute of limitations for perjury had long since run out in both of those cases.<sup>253</sup>

News of his imminent parole reached Zacke's adopted daughter, however, and she immediately contacted the authorities with a chilling tale: Zacke had repeatedly raped her when she was a young child.<sup>254</sup> She could not believe that he was to be released.<sup>255</sup> Summoning all her courage, she agreed to wear a wire into prison to visit Zacke.<sup>256</sup> During the course of their conversation, Zacke confirmed her story.<sup>257</sup> After being tried for rape, Zacke was sentenced to life in prison in December 2005.<sup>258</sup>

In denying Gerald Stano's request for a new trial based on Zacke's retraction of his damning testimony and the revelation that he was coached and rewarded by prosecutors, the Florida Supreme Court explained that "recanted testimony is exceedingly unreliable."<sup>259</sup> The testimony of Zacke was reliable enough to sentence a man to death, and another to a double-life sentence. But the retraction of that testimony, with an explanation of the basis for the perjured testimony, was "exceedingly unreliable" and thus insufficient grounds even for a retrial.

Meanwhile, in 2008, with the help of the Florida Innocence Project, Brevard County, Florida's third victim of John Preston's dog scent "evidence" finally gained his freedom after twenty-seven years in prison.<sup>260</sup> Like Ramos and Dedge, William Dillon was convicted for murder based in large part on the testimony of Preston.<sup>261</sup> And like Dedge, Dillon's case involved the testimony of jailhouse informants as well as highly questionable witness testimony.<sup>262</sup> In late 2008, the conviction was overturned on the basis of DNA evidence proving that, contrary to the evidence presented by Preston and his scent dog, Dillon had not worn a bloody t-shirt linked to the murder.<sup>263</sup>

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<sup>252</sup> D'Alemberte Interview, *supra* note 90; John A. Torres, *Prior Zacke Knowledge May Have Been Hidden*, FLA. TODAY, Jan. 23, 2006.

<sup>253</sup> Dyckman, *supra* note 72.

<sup>254</sup> D'Alemberte Interview, *supra* note 90.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> Torres, *supra* note 252.

<sup>259</sup> *Stano v. State*, 708 So. 2d 271, 275 (Fla. 1998) (citation and internal quotations omitted).

<sup>260</sup> Torres, *supra* note 252.

<sup>261</sup> Deanna Sheffield, *26 Years*, ORLANDO WEEKLY, Oct. 11, 2007, available at <http://www.orlando-weekly.com/features/story.asp?id=11883>; John A. Torres & Jeff Schweers, *Dog Handler Led to Bad Evidence*, FLA. TODAY, June 21, 2009, available at <http://florida-issues.blogspot.com/2009/06/dog-handler-led-to-bad-evidence.html>; John A. Torres, *Exonerated Wilton Dedge Inspired Dillon*, FLA. TODAY, Nov. 27, 2008, available at <http://lethal-injection-florida.blogspot.com/2008/11/exonerated-wilton-dedge-inspired-dillon.html> [hereinafter Torres, *Exonerated Wilton Dedge*].

<sup>262</sup> Torres, *Exonerated Wilton Dedge*, *supra* note 261; Sheffield, *supra* note 261.

<sup>263</sup> Sheffield, *supra* note 261; Torres, *Exonerated Wilton Dedge*, *supra* note 261.

Dillon had met Dedge in prison and was inspired by Dedge's exoneration to secure his own.<sup>264</sup> On the day of Dillon's release, Dedge drove to Dillon's jail to greet him and to share some words of wisdom.<sup>265</sup> Dedge may soon be making another trip: as this article goes to press, a fourth Brevard County man, "still in prison more than two decades after Preston and his German shepherd provided the key evidence allegedly tying him to the scene of the crime," is currently challenging his murder conviction with the help of Centurion Ministries, a group that has helped exonerate more than forty wrongfully convicted individuals.<sup>266</sup>

### III. CONCLUSION: AN URGENT NEED FOR REFORM

A single case, *State v. Dedge*, illustrates the myriad problems and manifest injustices in our criminal justice system. Armed only with grossly inconsistent eyewitness testimony, combined with unreliable microscopy evidence, prosecutors never should have brought the case in the first place, notwithstanding the understandable desire for justice. Indeed, the decision to prosecute Dedge on this scant evidence not only led to his wrongful conviction, but it put an end to any further investigation of the crime, ensuring that the real perpetrator would never be apprehended. The real rapist still walks among us.

As we have seen, canine scent identification has "little or no underlying body of scientific evidence affirming the validity of its use,"<sup>267</sup> yet it continues to be used in criminal trials. In *Dedge*, it was used by prosecutors without any inquiry into the outlandish assertions of the handler, a "regular" in Brevard County. The use of Clarence Zacke, likely the key element in Dedge's second wrongful conviction, was even more egregious. Even where prosecutors do not expressly offer reduced time in return for testimony, snitches benefit in myriad ways by testifying, whether through prison transfers or the use of that cooperation to obtain early parole. Prosecutors had already shaved a whopping 120 years off of Zacke's sentence. At Dedge's trial, moreover, Zacke admitted: "I'm hoping, that I will be on record with the State Department of Corrections [and] that this will look favorably when I do come up for parole."<sup>268</sup> "If any other lawyer offered a witness merely five-hundred dollars in return for his testimony, he'd be disbarred, and charges would be filed," says Horwitz.<sup>269</sup> "Yet, prosecutors offer to take fifteen years, even 120 years off of a person's prison term. Which do you think has a greater chance to subvert the system?"<sup>270</sup>

Even if prosecutors have no intent to suborn perjury, the system is inherently subject to abuse. Several studies of the wrongfully convicted have demonstrated the critical role that lying snitches played in those convictions. According to the Northwestern University Law School's Center on Wrongful Convictions, for example, "there have been 111 death row exonerations since

<sup>264</sup> Torres, *Exonerated Wilton Dedge*, *supra* note 261.

<sup>265</sup> *Id.*

<sup>266</sup> Scott Maxwell, *Did Magical Dog Jail a 4<sup>th</sup> Innocent Man?*, ORLANDO SENTINEL, June 24, 2009, available at <http://www.orlandosentinel.com/news/local/orl-asecorl-maxwell-preston-062409062409jun24,0,6536319,full.column>; *Five Years Later: Wilton Dedge and Dog-Scent Evidence*, Wrongful Convictions, available at <http://wrongful-convictions.blogspot.com/2009/08/five-years-later-wilton-dedge-and-dog.html> (stating that in July 2009, one year after Preston died, Florida state attorney Norm Wolfinger ordered a review of the murder and sexual battery cases in which Preston testified).

<sup>267</sup> See Brisbin et al., *supra* note 43 and accompanying text.

<sup>268</sup> 1984 Transcript, *supra* note 23, at 1220.

<sup>269</sup> Horwitz Interview, *supra* note 54.

<sup>270</sup> *Id.*

capital punishment was resumed in the 1970s. The snitch cases account for 45.9% of those.<sup>271</sup> Since the mid-1980s, federal sentencing guidelines have made things even worse. In federal cases, the only way to get below the sentencing guidelines is to provide “substantial assistance” to the government, i.e. the prosecutors. As Horwitz points out, “defendants will say anything they need to in order to get their sentence lowered.”<sup>272</sup>

After DNA burst onto the scene, the Florida state attorneys’ conduct in defending Dedge’s conviction can only be described, to use Hirsch’s word, as Orwellian. But their desire to preserve the conviction at all costs was not atypical. All too many prosecutors have ignored the United States Supreme Court’s admonition that:

[The prosecutor] is the representative . . . whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.<sup>273</sup>

As Scheck explains, that admonition was certainly ignored in *Dedge*:

They wouldn’t give us access to the evidence. They wouldn’t permit the DNA testing. Even when we got DNA testing that was exculpatory of Dedge, they didn’t want the judges to look at it. They didn’t care whether he was innocent. They were more interested in covering themselves against the possibility they made a grievous mistake. The so-called “finality of the system” was more important than getting an innocent person out of jail and finding the person who really committed the crime.<sup>274</sup>

The *Dedge* case may be egregious, but it is by no means unique. Although Dedge’s case has led to changes in Florida’s law, Florida and numerous other states continue to erect impossible hurdles to the wrongfully convicted, particularly with regard to the testing and introduction of DNA evidence. As one commentator explains, “[e]mpirical proof suggests that prosecutors have consented to DNA tests in less than fifty percent of the cases in which testing later exonerated the

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<sup>271</sup> Center on Wrongful Convictions, *The Snitch System 3* (Winter 2004-2005), available at <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBook1et.pdf>.

<sup>272</sup> Horwitz Interview, *supra* note 54.

<sup>273</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935); *accord* *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) (“The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible against the wall. His function is to vindicate the rights of the people as expressed in the laws, and give those accused of crime a fair trial.”); MODEL OF RULES OF PROFESSIONAL CONDUCT R. 3.8 cmt. 1 (2007) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence.”).

<sup>274</sup> AFTER INNOCENCE, *supra* note 117.

inmate.”<sup>275</sup> As a result, thousands of wrongfully convicted prisoners across this country continue to struggle to secure the preservation, testing, and introduction of biological evidence that could set them free.

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<sup>275</sup> Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 (2004).